

In the Matter of Arbitration

between

School District

and

Education Association, CTA/NEA

J L, Grievant

John F. Wormuth  
Arbitrator

Arbitrator's Case No. A-01-300

February 15, 2002

**CTA/NEA:**

Staff  
California Teachers Association

**JOINT UNIFIED SCHOOL DISTRICT:**

,  
Esq.  
District Counsel

## INTRODUCTION

This Arbitration arises from a grievance filed by Education Association CTA/NEA, hereafter referred to as the "Association", on behalf of J L, hereafter referred to as the "Grievant", under the terms and conditions of the Collective Bargaining Agreement in force between Education Association CTA/NEA, and Unified School District, hereafter referred to as the "District". The Grievant is a Certificated Employee with thirty-two years of District teaching experience. On the occasion of the District's employment of the Grievant, he was given service credit for four years of teaching experience in a Southern California Public School and has an accumulative total of thirty-six years of credited teaching experience. The Grievant alleges that the District has violated **Article 15, Compensation, Sections 15.1.1, 15.1.2, and 15.1.3** (DX 5, 13) when it denied his request that he be placed on Salary Schedule Step 36. Authority for this Arbitration is **Article 5: Grievance Procedure, Sections 5.1, 5.47** and the Association's standing as defined in **Section 5.34**. This Arbitration was initially heard on May 24, 2001, commencing at 10:00 am and a transcript of the proceedings was taken by CSR No. 6527. A certified copy of this transcript was received by the Arbitrator and is hereafter referred to as (TR 1). Resumption of the Arbitration occurred on October 2, 2001, commencing at 9:00 am and a transcript of the proceedings was taken by , CSR No. 2727. A certified copy of this transcript was received by the Arbitrator and is hereafter referred to as (TR 2). Both proceedings were heard at the above specified dates and times at the offices of the Joint Unified School District, California.

John F. Wormuth was selected by the parties as the Arbitrator in this matter to render an advisory award. The District disputes that the issues in this matter are timely and properly before the Arbitrator, and contends that all procedural requirements have not been met. On May 24<sup>th</sup>, 2001 the Arbitrator overruled the District's objection of arbitrability concerning the timeliness of the grievance, finding that the grievance is

1 timely and complied with the timelines of the Contract (TR 1:21). Other issues of  
2 arbitrability have been raised by the District and will be ruled upon and discussed later  
3 in this decision. Both the District and the Association, as required, submitted closing  
4 briefs by January 11, 2002 and upon receipt and acceptance by the Arbitrator the  
5 record of this proceeding was closed. The parties were given full opportunity to present  
6 evidence, examine and cross-examine witnesses, produce exhibits and present  
7 argument, and availed themselves of the opportunity to do so. The District introduced  
8 fourteen (14) Exhibits, the Association introduced four (4) Exhibits and there was one (1)  
9 joint exhibit introduced, all of which were admitted into evidence.

#### 10 **ISSUE**

11 The parties have stipulated that the issue before the Arbitrator is:

- 12 1. "Did Joint Unified School District (Employer) violate, misapply or misinterpret  
13 the Collective Bargaining Agreement at Article 15 when it failed to place  
14 (Grievant) on Step 36 of the Salary Schedule?"
- 15 2. "If the answer to question 1 is yes, what shall the remedy be?" (JX 1)

#### 16 **POSITION OF THE JOINT UNIFIED SCHOOL DISTRICT**

17 The District argued that the grievance should be denied because it is not  
18 arbitrable and, if found to be arbitrable, should be denied for lack of merit. In support of  
19 its argument that the grievance is not arbitrable, the District advances five (5) central  
20 arguments that form the foundation of its case. These arguments were vigorously  
21 advanced at the hearing of May 24<sup>th</sup> 2001 and subsequently covered at length in the  
22 District's closing brief.

23 **First:** the Grievant has failed to meet all of the required burdens, including the  
24 burden of coming forward, persuasion and proof, all of which are necessary to  
25 establish that the District did violate Article 15 of the Collective Bargaining Agreement.

1       **Second:** the District's application and interpretation of Article 15 is in  
2 accordance with unrefuted past practice. No persuasive evidence was introduced  
3 indicating that the District had agreed to any other interpretation of Article 15 that would  
4 be inconsistent with that established past practice; nor did the District agree in Collective  
5 Bargaining with the Association to a new interpretation or application that would be de  
6 minimis of the past practice standard.

7       **Third:** the Grievant violated his contractual obligation contained in **Article 5,**  
8 **Section 5.2** that required the Grievant to have an informal conference with his  
9 immediate Supervisor and the Grievant's alleged failure to do so invalidates the  
10 grievance. This requirement is not a mere inconvenience, but is an essential part of  
11 management's ability to resolve grievances at the lowest possible administrative level.

12       **Fourth:** the grievance is moot because the remedy sought by the Grievant was  
13 negotiated out of the Collective Bargaining Agreement with the support and concurrence  
14 of the Association. Since the Grievant seeks placement on Salary Schedule at Step 36  
15 as a remedy and because Step 36 no longer exists, it follows that the grievance must be  
16 moot.

17       **Fifth:** the subject matter of the grievance is properly a matter for Collective  
18 Bargaining. Essentially, this grievance arises as a result of a negotiated change to the  
19 Collective Bargaining Agreement and the relief sought by the Grievant is best obtained  
20 through that process. It is not proper to amend the Collective Agreement through the  
21 grievance procedure, thereby circumventing the bargaining process itself and obtaining  
22 a benefit that is not contemplated by the terms and conditions of the contract.

23       An underlying element of the District's argument is that, to advance above Step  
24 28, a teacher must work an additional year no matter how many years of service the  
25 teacher has. The language of Article 15 is permissive and provides that a teacher may  
26 advance "one step per year". Advancement, therefore, is not based upon years of

1 service as argued by the Grievant. When additional steps are added to the Salary  
2 Schedule, each teacher must earn advancement by working an additional year,  
3 regardless of a teacher's total years of service. This is the essence of the District's past  
4 practice. In the case of the Grievant, the District has applied the contract in proper  
5 manner that is consistent with this long established practice.

6 The District construes and interprets the notice provisions of **Article 5,**  
7 **Grievance Procedure** to be an inquiry notice provision, as opposed to a pure notice  
8 provision. As contended by the District, the inquiry notice provision imposes that the  
9 actual date an alleged grievable event occurs is the time when the constraints of the  
10 grievance procedure toll. This argument markedly differs from the concept of time tolling  
11 from the Grievant's actual knowledge or reasonably knowledge of the event. During the  
12 Summer of 2000 the District placed the Grievant on Salary Step 32, and this is the  
13 triggering event that tolled the timelines of the grievance procedure, as opposed to when  
14 the Grievant became aware of the event or was effected by it. Even though the Grievant  
15 was not on duty during the Summer of 2000, he and the Association had adequate  
16 notice of the salary placement, as required by the contract. It is the contractual  
17 responsibility of the Grievant and the Association to observe the inquiry notice provisions  
18 of the contract. When the Grievant was placed on Salary Step 32, the District office  
19 was open and both the Grievant and the Association had opportunity to investigate the  
20 accuracy of his salary step placement. Placement of certificated employees on a new  
21 step on the Salary Schedule for the following school year is during the Summer recess,  
22 which is the customary procedure and established practice followed by the District. It is  
23 when the District placed the Grievant on the new Step 32 in the Summer of 2000 that the  
24 Grievant had a contractual obligation to file his grievance. The timelines created by the  
25 inquiry notice provision limit the window of opportunity to file a grievance to twenty (20)  
26 days within the actual occurrence of the event. Once the initial twenty (20) day time

1 period has elapsed, the filing of a grievance is precluded. Because of the time  
2 limitations imposed by the inquiry notice provision it is irrelevant when the Grievant  
3 obtained personal knowledge of, or discovered the alleged improper step placement.  
4 Because the Grievant failed to meet his contractual obligation contained in the notice  
5 inquiry provision of the grievance procedure, the grievance should be denied.

6 The District argued that the grievance should be denied on the additional  
7 grounds that a Side Letter of Agreement, dated February 23, 2001 (DX 9), clarified the  
8 intention and purpose of the new Step 36. Step 36, whose numerical designation was  
9 removed from the contract by agreement of the parties, is designed to serve as an early  
10 retirement incentive program. In order to benefit from Step 36, a certificated employee  
11 had to agree to retire at the end of the school year, on or about June 30, 2001. Eligibility  
12 to advance to Step 36 was contingent upon retirement and the District has applied the  
13 contract as required. There is no contractual violation, because the Side Letter of  
14 Agreement (DX 9) governed the circumstances and requirements to advance to Step  
15 36. Throughout the school year, those unit members who were eligible for placement on  
16 Step 36, and agreed to retire, were conferred the full benefit and entitlement of Step 36.  
17 The grievance should be denied since the Grievant did not comply with the Side Letter  
18 of Agreement (DX 9) and retired.

19 **POSITION OF THE EDUCATION ASSOCIATION CTA/ NEA**

20 It is the position of the Association that the grievance is properly before the  
21 Arbitrator since the Grievant has complied with all the requirements imposed by the  
22 grievance procedure. The Grievant has met the required burdens of coming forward,  
23 persuasion and proof. Further, the subject matter of the grievance is not moot because  
24 the alleged violation of improper salary step placement of the Grievant by the District  
25 continues. The remedy sought by the Grievant is within the confines of the Collective  
26 Bargaining Agreement and within the authority of the Arbitrator.

1           The Grievant met his burden of coming forward by immediately notifying his  
2 principal of the alleged improper salary step placement and sought the principal's  
3 assistance in resolving the issue. This notification met requirements of the contract since  
4 the site administrator is the Grievant's immediate Supervisor. Notification by the Grievant  
5 to his immediate Supervisor was without delay and timely. This notification took place by  
6 the Grievant upon receipt of his paycheck of September 30, 2000 (DX 4), which was  
7 the first time that the Grievant became aware of the improper salary step placement.

8           It is unreasonable to conclude that the Grievant should have known of the  
9 contract violation under the theory of the inquiry notice provision advanced by the  
10 District. During the Summer of 2000, when the actual Salary Schedule was developed,  
11 the Grievant was not on duty. The Salary Schedule in question was constructed during  
12 the Summer of 2000 but any benefits or change from the Salary Schedule were not  
13 effective until the first pay warrant of the new school year. When the District issued the  
14 first pay warrant, that is the point in time that any errors or omissions would reasonably  
15 be discoverable by the Grievant. In effect, it was not until the September 30<sup>th</sup> 2000 pay  
16 warrant that the Grievant was in fact adversely affected and the improper placement  
17 continues with each successive pay warrant issued. Because the Grievant is not paid at  
18 the proper step with each warrant that has been issued after September 30<sup>th</sup> 2000, the  
19 contract violation continues and the grievance renews itself. Upon learning of the  
20 District's alleged error in the pay warrant of September 30<sup>th</sup> 2000, the Grievant promptly  
21 notified his immediate Supervisor and, by doing so, met the burden of coming forward.

22           The Association contends that the theory of an inquiry notice provision rather than  
23 pure notice is an effort by the District to avoid reconciling and correcting a serious  
24 misapplication of the Collective Bargaining Agreement. Should the contract be  
25 interpreted so narrowly as the District argued, it would render the grievance procedure  
26 useless. A grievant individual knowledge of an alleged contract violation may not



1 coincide with the calendar date of the inquiry provision theory. This is because the  
2 affected individual may not be aware of having been aggrieved or suffered the  
3 consequences of an alleged contract violation. This information may not become known  
4 until a distant date from the actual date that the District allegedly violated the contract. If  
5 this theory prevails there would be no effective means of addressing contract violations  
6 within the confines of the contract. Under this theory the District would unreasonably  
7 benefit from its errors and have little incentive to comply with the Collective Bargaining  
8 Agreement.

9 All of the District's arguments concerning arbitrability must be denied because  
10 the grievance has been found to be timely. Once a determination of timeliness has been  
11 made, the remaining defenses of the District concerning arbitrability must fall. A finding  
12 that the grievance is timely cures the issues raised by the District of whether or not the  
13 grievance is moot, or if the Grievant met burden of coming forward, as well as the proper  
14 venue for the grievance. In view of the Arbitrator's ruling of May 24<sup>th</sup> 2001 that the  
15 grievance is timely, the issues that remain are those concerning the merits of the  
16 grievance and if they are properly before the Arbitrator.

17 The Association contends that the Grievant met the contractual obligation to  
18 have an informal conference with his immediate Supervisor. When the Grievant  
19 discovered that he was not on the proper Salary Schedule step, as discovered and  
20 evidenced to him by the September 30<sup>th</sup> 2000 pay warrant, the Grievant, without delay,  
21 brought the matter to the attention of his immediate Supervisor. It was only after an  
22 informal conference and subsequently determining that the immediate Supervisor  
23 lacked the authority to remedy the grievance that they went to the formal level. In every  
24 respect, the Grievant complied with the contract provisions of the grievance procedure.  
25 If the Grievant had not moved the grievance to the formal level there would have been

1 no chance of resolution, as the solution requested exceeded the authority of the site  
2 administrator.

3 During negotiations for the 2000-2001 school year the parties concluded an  
4 agreement that provided for the creation of two Salary Schedule Steps labeled 32 and  
5 36. In addition, the agreement arrived at called for advancement to 32 and 36 to be  
6 based on years of service. Following the initial agreement, on February 23, 2001 (DX 7),  
7 a contract amendment was entered that the Association believes clarified that the only  
8 criteria for advancement to salary Steps 32, 36 and beyond is years of service. The  
9 Association argues that the language of the contract amendment is clear and  
10 unambiguous and contains years of service as the only qualification for advancement.  
11 Further, the Association agreed to the Side Letter of Agreement (DX 9) in order to  
12 protect the retirement benefits of those who were about to retire. The Association argues  
13 that it never abandoned its position of contesting the District's interpretation governing  
14 eligibility to move to salary Step 32 and beyond. Throughout this entire period of time,  
15 the Association made it clear that it disputed the District's interpretation of the  
16 qualifications for movement on the Salary Schedule Steps beyond Step 28. However,  
17 had not the Association agreed to the Side Letter of Agreement (DX 9), which the  
18 Association believed had limited application, certain unit members who were about to  
19 retire would have suffered irreparable financial loss. Imposing this financial loss on its  
20 members would have constituted an act of total irresponsibility on the Association's part.  
21 By signing the Side Letter of Agreement (DX 9) the Association chose to protect the  
22 interests of its members on the verge of retirement and to grieve the merits of the case  
23 through the grievance procedure at a later date.

24 The grievance should be sustained because the Grievant meets the years of  
25 service required to be placed on Salary Schedule Step 36. The District has never  
26 disputed the Grievant's date of employment or prior service credit granted when

1 employed by the District. Neither has the District disputed the Grievant's eligibility for  
2 advancement to Salary Schedule Step 32. The qualifications to be placed on Salary  
3 Schedule Step 32 are years of service. It is the Association's position that the same  
4 criteria that governs placement on Salary Schedule Step 32 must also be applied to  
5 Salary Step 36 and beyond. The contract language does not support the District's use  
6 of Salary Step 36 as an early retirement incentive. No evidence was introduced to  
7 establish the Association agreed that Salary Step 36's purpose is a retirement incentive  
8 and that eligibility for placement is contingent on retirement.

### 9 **DISCUSSION**

10 The District contends that the grievance is not arbitrable because it fails to  
11 comply with the inquiry notice provision and is moot. As argued by the District, the  
12 inquiry notice provision tolls the twenty (20) day time limit to file an effective grievance  
13 from the actual date the District determined Grievant's salary step eligibility. This date  
14 should be distinguished from the date and time that the Grievant knew of or was  
15 affected by the District's Salary Schedule determination. It was during the Summer  
16 recess that Salary Schedule placement was determined and that the twenty (20) day  
17 time limit tolls. There are two methods that the District uses to determine salary step  
18 placement: first: the certificated employee submits a transcript detailing units earned at  
19 an accredited institution of higher learning; or, second: the certificated employee has  
20 accumulated the required service time to be eligible for longevity steps. The former  
21 schedule movement is based on the District's verification and acceptance of the units  
22 presented, while the latter is in function of years of service. The parties do not dispute  
23 that when the Salary Steps 32 and 36 were negotiated placement on Salary Step 32 was  
24 based on years of service and that those certificated employees that were on Salary  
25 Step 28 automatically advanced to Salary Step 32. At the time that the parties concluded  
26 the current agreement, the highest step on the Salary Schedule was Step 28. The

1 Salary Schedule scheme that was developed is the product of a negotiated Collective  
2 Bargaining Agreement.

3 The language of the Grievance Procedure precludes the narrow definition as  
4 argued by the District. **Article 5: Procedure for Processing Grievances Sec 5.3.1.1**  
5 must be read to refer to the aggrieved individual's knowledge of a grievable event and  
6 from that date the twenty (20) days toll to file a grievance. Any other reading would  
7 reduce the grievance procedure to idle words throwing the entire dispute resolution  
8 mechanism into chaos. Should the District's interpretation of the notice provision  
9 become the standard by which the validity of a grievance is to be judged, that  
10 judgement, at a minimum, would limit the effectiveness of the grievance procedure and  
11 contribute little toward the expeditious resolution of grievances. In fact, the result would  
12 be a grievance procedure that was based on a host of technicalities and whose notoriety  
13 would be a "gotcha " mentality. In order to arrive at the same definition of notice as the  
14 District, it is necessary to accept the proposition that the notice provision must be  
15 applied restrictively. Adoption of this restrictive standard would mute the grievance  
16 procedure and render it moot by obscuring its true intent and purpose. The District's  
17 interpretation of the notice requirements would in practice be unilateral, since it is the  
18 District that controls the pace and underlying aspects of its administrative functions.  
19 Short of the Association posting a member in the District's facilities to review each and  
20 every administrative function that could possibly impact an individual or the membership  
21 at large, there exists no avenue for the Association to comply with the inquiry notice  
22 provision. The District's argument further suggests that an individual employee would be  
23 well served to review every single administrative action of the District, even routine  
24 clerical matters, at the time of their occurrence so as to ensure that no errors were made  
25 and to protect their contractual right to grieve. Under this theory there exists no means  
26 to correct the simplest of errors, unless the aggrieved individual happens to have caught

1 the District's error within twenty (20) days from the event. This would create an  
2 impossible set of events that a grievance procedure is designed to avoid. It could well  
3 become the preoccupation of the parties to diligently search for errors in order to avoid  
4 not being able to effectively resolve them. Certainly, neither party to this agreement  
5 would want such a set of circumstances, as it could well hobble and diminish the mission  
6 and purpose of the District. Countless hours would be spent reviewing matters that  
7 previously were presumed, upon discovery, to be grievable under the pure notice  
8 concept. The long established principle in labor Arbitration that time is tolled from the  
9 date that the grievant became aware of a grievable event is best summarized in  
10 **Fairweather's Practice and Procedure in Labor Arbitration, BNA 1999, pg 127-128:**  
11 *"Although arbitrators generally reason that grievants should be aware of their injury*  
12 *before the time limit begins to run, such awareness is held to occur upon the first clear*  
13 *and overt act sufficient to provide notice. (\*)* It is clear that in the instant case the  
14 Grievant first became aware of injury when he received his first pay warrant on  
15 September 30, 2000. Therefore, the most reasonable construction of the notice  
16 provision is that the Grievant has complied with it. The District contends that the  
17 grievance is moot and should be denied because the remedy sought by the Grievant no  
18 longer exists. The Grievant seeks to be placed on Salary Step 36, but the Association,  
19 on February 23, 2001 (DX 7), negotiated the remedy out of the contract with the  
20 elimination of Salary Step 36. Rather, Salary Steps 32 and 36 were replaced with  
21 longevity increases to be credited every fourth year after Step 28.

22 The essence of the District's argument is found in (TR 1: 27 16-18) *"A case in*  
23 *controversy becomes moot when the essential nature of the complaint is lost because of*  
24 *some supervening act or acts of the parties .* However the underlying controversy has  
25 not changed nor has it been materially altered by the parties agreement of February 23,

1 2001 (DX 7). The nature of the dispute is the application of a longevity increase, which  
2 is the substance of the grievance filed on November 26, 2000 (DX 5). No compelling  
3 evidence was introduced to indicate that the former Salary Step 36 is anything other  
4 than a longevity step. If anything, the contract amendment of February 23, 2001 (DX 7)  
5 clarified the previous contract language of July 19, 2000 (DX 6). The replacement  
6 amendment of February 23, 2001 (DX 7) left little doubt that salary step movement  
7 beyond Step 28 is based on years of service.

8       The contract amendment executed by the parties is not a supervening clause but  
9 is a negotiated clarification of a pre-existing contract provision. Since this is the case,  
10 the grievance is not moot. Further, because this is a continuing contract violation that  
11 occurs each and every pay period successive to September 30, 2000, the grievance  
12 automatically renews. This principle is discussed in **Fairwater's Practice and**  
13 **Procedure in Labor Arbitration, BNA 1999, pg 129:** *"If the grievant continues to*  
14 *suffer from the alleged contract violation, the arbitrator may find that the violation is a*  
15 *continuing one. In such a case, the limitations period recommences each day; hence,*  
16 *the time for filing the grievance is extended".* Essentially, this prevents an employer  
17 from profiting from its mistakes if a contract violation is found and permits a remedy that  
18 restores the grievant's economic loss. In the instant case, the Grievant asserts a  
19 continuing economic loss since September 30<sup>th</sup> 2000, and because the matter has not  
20 been rectified, the injury is present. Therefore, the grievance renews itself with each  
21 alleged occurrence. Once the essence of a grievance is determined to be a continuing  
22 violation of the contract, as is the case here, it cannot be considered moot. It is argued  
23 by the District that the grievance should be denied because the Grievant failed to have  
24 an informal conference with his immediate Supervisor. **Article 5: Procedure for**  
25 **Processing Grievances Sec 5.2 Informal Level** states: *"Before filing a formal, written*

1 *grievance, the grievant shall attempt to resolve it by an informal conference with the*  
2 *immediate supervisor” (DX 1).*

3 D R, who was the Grievant’s immediate Supervisor, testified that he had received  
4 an informal inquiry from the Grievant, the subject of which was the Grievant’s  
5 contention that he had been placed on the incorrect step of the Salary Schedule. When  
6 questioned as to how he handled the informal grievance, principal R testified (TR 1  
7 31:7) *“I brought it out here to the District office”*. This unrefuted testimony supports the  
8 Grievant’s testimony that he had an informal conference with his immediate Supervisor.  
9 (TR. 1 34:6-8).

10 What is clear beyond any doubt is that Principal R lacked the authority to remedy  
11 the grievance. It is absurd to argue that the immediate Supervisor should have held in  
12 abeyance a grievance over which he lacks authority for the sake of a ceremonial  
13 informal conference. In fact, the Supervisor’s actions represented a high degree of  
14 responsibility when he directed the grievance to the attention of higher authority. This is  
15 especially critical since the Grievant is seeking redress for alleged economic injury. It is  
16 not unusual that first line supervisors lack the authority to adjust grievances that claim  
17 economic injury.

18 It is important to remember that an informal conference is an attempt to resolve  
19 the grievance at the lowest possible administrative level. It is not a contract bar to the  
20 grievance procedure. Accordingly, when an informal conference fails to produce a  
21 resolution to a grievance, whether that failure is the result of lack of authority or other  
22 defect, it must move to the next level to find its resolution.

23 The merits of the grievance concern issues of past practice and contract  
24 language. An examination of the testimony presented indicates that both the District and  
25 the Association have irreconcilable versions of the contract’s interpretation. These  
26 differences spill into individual recollections of events that caused the addition of two

1 additional salary Steps: 32 and 36. Each party's version of events differs so greatly that  
2 a reconstruction of mutual intent is impossible.

3 The history surrounding salary schedule movement has been a contentious arena  
4 of negotiations for many years; the District steadfastly holding the position that  
5 movement on the schedule is not based on years of service, while the Association has  
6 sought to provide longevity steps that base movement on years of service as its sole  
7 criteria.

8 What is not in dispute is that the parties negotiated and agreed that for the school  
9 year 2000-2001 the salary schedule would have added to it the additional Salary Steps  
10 32 and 36. During this process, both the District and the Association arrived at an  
11 agreed dollar value for each new cell. There is no dispute about the dollar amount of  
12 each new cell, the service element of four years that separate the steps, or the eligibility  
13 for placement on the former Salary Step 32. The dispute is about the requirements and  
14 the criteria necessary for placement on former Salary Step 36 and the District's  
15 utilization of it as a retirement incentive. Further complicating the matter is that on  
16 February 23, 2001 (DX 7), by mutual agreement, the numerical designation of Salary  
17 Steps 32 and 36 was removed from the contract and replaced with an asterisk. In  
18 addition, the agreement of February 23, 2001 (DX 7) defines the asterisk to mean  
19 *"Longevity steps continue to be credited every 4<sup>th</sup> year after Step 28 with the dollar*  
20 *amount of increase being the difference between AB 60 Step 24-28."* The agreement of  
21 February 23, 2001 (DX 7) not only made numerical changes to the Salary Schedule  
22 longevity steps but also expanded the number of steps beyond the original agreement of  
23 July 19, 2000 (DX 6). For the first time, the new agreement clearly defines that steps  
24 beyond Salary Step 28 will be credited every fourth year. This is a significant change in  
25 the terms and conditions that govern Salary Schedule step placement.



1           It is against this backdrop that the interpretation of the agreement expressed by  
2 the parties must be viewed. The District argues that, by virtue of past practice,  
3 placement on the Salary Schedule by years of service has never been allowed.  
4 Regarding the Salary Schedule steps themselves, as argued by the District, a  
5 certificated employee must serve a year in their current step before advancement is  
6 permitted. This may well have been so in the past, but the negotiated agreement dispels  
7 that theory of application. Whatever occurred in the past cannot by its own weight  
8 discredit a negotiated agreement. The agreement of July 19, 2000 (DX 6) and February  
9 23, 2001 (DX 7) forever changed the Salary Schedule placement. The District's  
10 interpretation that a certificated employee must serve one year on a salary step before  
11 advancing to the next, in the instant case, is not true. A distinction in California Public  
12 Schools between salary schedule accreditation based on units and those on longevity  
13 credit is well established. This grievance concerns longevity credit, not unit accreditation.  
14 No convincing evidence or testimony was presented that alleges the language of the  
15 disputed agreement is ambiguous. Since the language suffers no defect as to its  
16 purpose and intent, it therefore must be applied as the parties negotiated it. This long  
17 established principle of contract interpretation is in **Fairweather's Practice and**  
18 **Procedure in Labor Arbitration, fourth edition, page 243, BNA Books 1999:**

19           *"When contract language is clear and unambiguous, arbitrators will apply its plain*  
20 *meaning and will not look outside the four corners of the document to ascertain the*  
21 *intentions of the parties. In other words, the words in the contract will be given their*  
22 *ordinary meaning where nothing appears to show that they were used in a different*  
23 *sense of have technical meaning, and where no unreasonable consequences will result*  
24 *from doing so. Even though the parties to an agreement **disagree** on what the contract*  
25 *language means, an arbitrator who finds the language to be unambiguous will enforce its*  
26 *plain meaning".*

1           The agreements of July 19, 2000 (DX 6) and February 23, 2001 (DX 7) are clear  
2 and unambiguous to its meaning and intent. Certainly the parties disagree as to the  
3 appropriate interpretation that should be applied. But the burden that the District bears  
4 is a heavy one and it is difficult to apply an interpretation of the Article other than the one  
5 the plain language would compel. The District was not participating in a unilateral  
6 process that nullified its power to reject an unacceptable proposal. No evidence was  
7 produced that the District was anything other than an equal partner in the negotiation's  
8 arena.

9           The District raises the issue of the establishment of past practice and that it  
10 should regulate the current Salary Schedule scheme. However, the current contract  
11 language was not in effect when the parties may have relied on past practice. Therefore,  
12 no past practice standard can be relied upon in the interpretation of the new provision.  
13 When a new salary step configuration was agreed to, it dramatically changed the  
14 eligibility for placement beyond Step 28. Since this grievance's subject matter is the new  
15 contract that has different requirements, no past practice has been established.

16           A further point of contention is the meaning of the Side Letter of Agreement dated  
17 February 23, 2001 (DX 9) and what impact it may have on this grievance. The District  
18 produced testimony that the intent of former Salary Step 36 is to provide retirement  
19 incentive to those Senior Staff members who desired to retire. However, in order to  
20 receive the benefit of Step 36 a certificated employee had to agree to resign. Ample  
21 evidence was presented that this was in reality how the District administered former  
22 Salary Step 36. The Association presented witnesses that testified that they received  
23 Step 36 retroactive to the beginning of the school year, after notifying the District of their  
24 intent to retire. The Association further contends that the only reason they signed the  
25 Side Letter of Agreement dated February 23, 2001 (DX 9) was to protect the retirement  
26 benefits of their colleagues. When the Association signed the Side Letter it made

1 clear to the District that it was not abandoning its opposition to the District's application  
2 and interpretation of former Salary Step 36 .

3 The evidence and testimony submitted indicates that from the inception of the  
4 agreement of July 19<sup>th</sup> 2000, (DX 6) the parties were unable to agree to its meaning.  
5 Proof of this disagreement is found in the party's own actions of February 23, 2001  
6 (DX 7) when they abolished the numerical designations above Salary Step 28 and  
7 replaced it with an asterisk. But they also added language that defined longevity  
8 movement above Step 28 as years of service. There can be no other reading of this  
9 language because the remaining portions of schedule movement are primarily  
10 governed by the specific accumulation of academic units. There is no such controlling  
11 feature to the Salary Schedule beyond Step 28. This lends credence to the  
12 Association's reasoning to agree to the Side Letter of February 23, 2001 (DX 7); namely,  
13 the protection of retirement benefits. If the Association had not agreed to the Side Letter  
14 its members who were about to retire would have suffered great economic loss. It is the  
15 State Teachers Retirement System that regulates and applies retirement formulas, not  
16 the parties to this contract. In order to derive a benefit from former Salary Step 36 a  
17 retiring teacher had to work at the salary rate it generated. In its simplest form, had not  
18 the Association agreed to the Side Letter of February 23, 2001 (DX 7) the very  
19 retirement program that the District claims is the proper use of former Salary Step 36  
20 would not have been possible.

21 Neither party produced any evidence that an agreed to retirement incentive was  
22 the result of the contract negotiations. Absent an agreement by the parties to use former  
23 Salary Step 36 as a retirement incentive and its subsequent utilization by the District  
24 as such must be viewed as the District's own interpretation. The District's use of the  
25 former Salary Schedule Step 36 as a retirement incentive is a violation of the terms and

1 conditions of the collective bargaining. Former Salary Step 36 is a longevity step whose  
2 eligibility is years of service, as is the former Salary Step 32.

### 3 **FINDINGS AND CONCLUSIONS**

- 4 1. The District's objection to the Arbitrability of the grievance is overruled. The  
5 grievance is found to be arbitrable.
- 6 2. The Grievant has complied with the contractual obligations of the contract.
- 7 3. The notice provision of the contract is not an inquiry notice provision but a  
8 pure notice provision. The time limits of the grievance procedure toll from  
9 when the Grievant knew of or was effected by the violation.
- 10 4. The District did violate **Article 15 Compensation Sections 15.1.1 , 15.1.2**  
11 **and 15.1.3** when it failed to place the Grievant on the former Salary Step 36.  
12 Salary Steps beyond Step 28 are pure longevity steps and are governed by  
13 years of service. The grievance renews itself with every violation successive  
14 to September 30, 2000, the date that the Grievant noticed the violation.

### 15 **ADVISORY REMEDY**

16 The Grievant, J L, is to be placed on the Salary Schedule Step appropriate for his  
17 total years of service. The method that is to be used to arrive at the proper salary step  
18 placement is the formula contained in the agreement of February 23, 2001 (DX 7); this  
19 placement is not to exceed the economic value of the former Step 36 retroactive to  
20 September 30, 2000. There is no award made for interest, or other economic  
21 contingences or alleged damages.

22 The Grievance of Education Association, CTA/NEA on behalf of itself and the  
23 Grievant is sustained.

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John F. Wormuth, Arbitrator

February 15, 2002

